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IN THE

Supreme Court of the United States

October Term, 1930.

No. 193.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

vs.

HAL NORWOOD, ATTORNEY GENERAL OF THE STATE OF ARKANSAS; JOE JOINER, PROSECUTING ATTORNEY FOR THE THIRTEENTH CIRCUIT OF ARKANSAS, ET AL., ETC.,
Appellees.

Appeal From the District Court of the United States for the Western District of Arkansas

BRIEF FOR APPELLEES

STATEMENT.

This is an appeal from an order by a three-judge statutory court sustaining a motion to dismiss appellant's bill of complaint against the Attorney General of the State of Arkansas, and the prosecuting attorneys for the 12th and 13th Circuits. Appellant seeks to restrain the enforcement of the Arkansas "full train crew law" (passed in 1907) and "full switching crew law" (passed

in 1913) on the ground that said statutes have become void, and now (1) are unlawful attempts to regulate interstate commerce, (2) impose undue and unreasonable burdens thereon, (3) deprive the appellant of its property without due process of law, and (4) deny to appellant the equal protection of the laws.

These two laws were explicitly held to be constitutional by this court in—

Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453.

St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518.

The statement of appellant is incorrect in describing these laws as the "Arkansas extra brakemen and extra switchmen laws", a description not warranted by their provisions, or justified by common usage. The laws are correctly described early in appellant's own bill as the "Arkansas full switching crew and full train crew laws". (Rec. 6.) They are similar in content and purpose to the laws of many other states which are listed in the Appendix to this brief, and which constitute a body of state law well known and frequently described in judicial opinions as "full crew laws".

Appellant's bill is directed, not against an exceptional law of the State of Arkansas, but against a large body of state law which has hitherto been sustained by the decisions of this court, which decisions appellant now seeks to reverse, and thereby to bring about the wholesale annullment by judicial action of state legislation enacted and sustained under the police power to protect the public safety and welfare. Such legislation has been operative in various states for many years, and its validity has been consistently upheld by the Supreme Courts of the

several states, and the Supreme Court of the United States.

Appellant's statement of the case is also incorrect in the intermingling of allegations of the bill of complaint with statements made in affidavits filed in support of the motion for a temporary injunction. These affidavits constitute a large part of the record (Rec. 19-103), but the existence of the facts therein alleged is not admitted by the motion to dismiss, whereby only facts well pleaded in the bill of complaint are admitted. A glance at the citations of the record in appellant's statement will show that almost all the allegations of fact relied on by appellant are found **in the affidavits** and **not** in the bill of complaint. The bill of complaint itself consists largely of the conclusions of the pleader, supported by a few assertions, many of which are controverted by established facts, of which the court will take judicial notice.

> "Judicial notice can and must be taken even as against the averments of contrary conclusions in a pleading." *U. S. vs. Flournoy, etc., Co.*, 71 Fed. 572.

It is, therefore, necessary for appellees to make a short summary of the actual allegations of the bill of complaint in order that the actual issues of the present case may be clearly defined.

Allegations of Bill of Complaint

The appellant represented to the court (Par. V) that railroad operating conditions "generally differ from operating conditions which existed in 1907 and 1913 when the Arkansas full switching crew and full train crew laws were passed"; that road and equipment is now heavier and stronger and safer; that freight trains "containing many more cars than those which could be safely oper-

ated when said laws were enacted can now be operated in Arkansas, and throughout the United States generally, much more safely than smaller trains could then be operated"; that additions and betterments have been made for the express purpose of increasing efficiency and safety "in the running of longer and heavier freight and passenger trains". (Rec. 6.)

Even if appellant's dubious conclusion that heavier, stronger and longer trains are also "safer", is accepted as an allegation of fact, there is no allegation, nor even any implication, that **fewer men** are needed to operate **longer** and heavier trains in 1931 than were needed to operate lighter and shorter trains over twenty years ago. On the contrary it is obvious that **more men** are needed to handle and inspect **more cars** and longer trains.

Appellant alleges that it is "standard practice * * * wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the extra switchmen and extra brakemen provided by the Arkansas laws". But, subsequently in Paragraph VI (Rec. 8), appellant qualifies this allegation by asserting that the "standard crew" engaged in switching and freight train service contains one less brakeman **"with the exception of the service in states with laws similar to the above laws of the State of Arkansas"**. Thereby, the force of appellant's allegation as to what is "standard practice" is destroyed when the attention of the court is called to the number of laws which prohibit any such "standard practice".

In addition, it will be noted that the allegations of the bill of complaint are further qualified by the allegation that trains and switch engines are commonly operated "except in the State of Arkansas * * * wherever

the traffic and circumstances make such operation advisable without such extra switchmen and extra brakemen". (Rec. 7.) Thereby, the complaint admits through its own allegation that traffic and circumstances do make it advisable at times to use the full crews required by the Arkansas law. Since it is a matter of common knowledge, of which the court will take judicial notice, that freight trains are operated today in various parts of the United States, which vary in length from a few cars to over one hundred cars, it must be obvious, regardless of, or even despite the allegations of the bill of complaint, that the same number of men can not operate any freight train under any circumstances in road or switching service with the same safety and efficiency, and that there can be no "standard practice" for operating trains, regardless of the number of cars or the circumstances of operation.

The bill of complaint in Paragraphs VI and VII alleges that various savings could be made by the complainant if not required to comply with the Arkansas full crew laws, but there is no allegation of fact which even implies that there is any less need for the full crews required by the Arkansas laws, to operate the heavier and longer trains now being operated today, than there was to operate shorter trains years ago when these same laws were sustained by the Supreme Court of the State of Arkansas and the Supreme Court of the United States.

It is apparent on careful reading that the allegations of the bill of complaint, up to Paragraph X (Rec. 11) amount to nothing more than a reassertion of the same contentions previously made in this court when the validity of these laws was originally assailed. They are the same contentions which were rejected when the laws were sustained by the Supreme Courts of the State of

Arkansas and of the United States. This probably explains why these contentions receive only perfunctory support in the first 4 pages of appellant's 62-page argument. Appellant cannot reasonably expect this court to annul laws now more essential to the public safety than when they were originally sustained by this court, on a mere reargument of the objections originally made.

The principal contentions of appellant (to which almost all of its argument is addressed) are based on the allegations of the bill of complaint found in Paragraphs X, XI, XII. It is alleged that the statutes of Arkansas are in conflict with the general scheme of Federal regulation, as shown in the Interstate Commerce Act, as amended by the Transportation Act of 1920, and by the Railway Labor Act of 1926. The Appellant seeks to have this court overrule its previous opinions sustaining the Arkansas laws on the ground that since those opinions were rendered, Congress has undertaken a more comprehensive scheme of regulation, and has extended the exercise of the Federal power under the Interstate Commerce clause of the Constitution to cover the subject matter of regulating the number of men to be employed in operating trains engaged in interstate commerce. These whole-hearted contentions of appellant were seriously presented before the statutory court, and almost the entire opinion of that court was devoted to a consideration of this issue. The court held, after an exhaustive analysis of recent amendments to the Interstate Commerce Act, that the Federal Government had not occupied by national legislation the field covered by the Arkansas laws, that Congress had not intended, in passing the Transportation Act or the Railway Labor Act, to occupy this field, and that, therefore, the laws which had been previously sustained by the Supreme Court as valid exercises

of the state police power are still constitutional enactments.

Appellees believe that the three-judge statutory court properly held that Congress has not attempted to occupy this field of state regulation either by passing any law directly regulating the number of men required to operate trains, or by authorizing the Interstate Commerce Commission to make any such regulations. But it is the prior contention of appellees that the bill of complaint should have been dismissed (without the necessity of examining into this question) on two grounds set forth in the motion to dismiss: First, because this is a suit against the State of Arkansas, in contravention of the Eleventh Amendment; and Second, because the complainant is seeking to enjoin the enforcement of the criminal statutes of the State without undertaking to avail itself of the full and complete remedy which it has at law in defending against the suits brought against it by appellees to enforce the laws of the State in the courts of the State.

Inasmuch as the Supreme Court of the United States has never held that a bill in equity will lie to prevent the enforcement by the Attorney General of the laws of a state **which the Supreme Court itself has previously held to be constitutional**, we submit that the primary and most important point to be determined in this case lies at the threshold of the proceeding: **Did the three-judge statutory court have any jurisdiction to entertain this bill of complaint in view of the specific prohibition of the Eleventh Amendment?**

Furthermore, we would submit that the Supreme Court of the United States has **never** decided that (1) where a criminal prosecution has been brought to enforce a law of a state in the courts of a state, after the law has been held constitutional by the Supreme Court of

the United States, and (2) where the defendant has a complete remedy at law by setting up the alleged unconstitutionality of the law and obtaining eventually another decision by this court upon that question, he can, without appealing from a decision against him in the state court, transfer the controversy to the Federal courts and file a bill in equity for the purpose of enjoining the enforcement of the state law which has been held by this court to be the law.

These questions, we submit, are of primary and grave importance. Therefore, before undertaking any argument in support of the opinion of the three-judge statutory court, we would ask this court to determine whether the decision of the statutory court should not be sustained upon those grounds of the motion to dismiss, which were rejected by the statutory court.

The opinion of the three-judge statutory court is found in *Mo. Pac. Railroad Co. v. Norwood, et al.*, 42 F. (2d) 765.

Summary of Argument

I.

The bill of complaint was properly dismissed because this is a suit against the State of Arkansas in contravention of the Eleventh Amendment to the Constitution of the United States. A federal court has no jurisdiction to enjoin state officers from enforcing a state statute which has been held constitutional by the Supreme Court of the United States.

In re Ayers, 123 U. S. 443;
Minnesota v. Hitchcock, 185 U. S. 373, 386;
Fenner vs. Boykin, 271 U. S. 240;
Mass. State Grange vs. Benton, 272 U. S. 525.

II.

The bill of complaint was properly dismissed because the complainant had a plain, adequate and complete remedy at law.

Judicial Code, Sec. 267;
Terrace vs. Thompson, 263 U. S. 197;
Packard vs. Banton, 264 U. S. 140;
Hygrade Provision Co. vs. Sherman, 266 U. S. 497.

"The accused should first set up and rely upon his defense in the State courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise if, whenever about to be charged with violating a State law, one were permitted free-

ly to contest its validity by an original proceeding in some federal court."

Fenner vs. Boykin, 271 U. S. 240, 243.

III.

The bill of complaint was properly dismissed because it did not allege and properly plead any facts which, if proved, would warrant the court in adjudging that these Arkansas statutes (which had been previously upheld by the Supreme Court of Arkansas and the Supreme Court of the United States) were arbitrary exercises of the police power of the State.

Equitable Life Ins. Co. v. Brown, 213 U. S. 25, 43.

Southern R. Co. v. King, 217 U. S. 524, 534.

C. R. I. & P. R. Co. v. Arkansas, 219 U. S. 453.

Atl. Coast Line v. Goldboro, 232 U. S. 548.

Standard Oil Co. v. Marysville, 279 U. S. 582, 584.

IV.

The bill of complaint was properly dismissed on the ground that the Congress has not undertaken to occupy the field of legislation covered by these (and other similar) state statutes, and that, therefore, the state police power can be, and has been, validly exerted in this field.

B. & O. R. Co. v. U. S., 277 U. S. 291.

Peoria & P. U. R. Co. v. U. S., 263 U. S. 528.

U. S. v. Penn. R. Co., 242 U. S. 208.

Interstate Com. Com. v. Goodrich Tr. Co., 224 U. S. 194, 214.

Interstate Com. Com. v. U. S. ex rel., 280 U. S. 52, 69.

V.

The intention of Congress to exclude exercise of the state police power must be clearly manifested.

Napier v. Atlantic Coast Line, 272 U. S. 605.
Savage v. Jones, 225 U. S. 501, 533.
C. R. I. & P. R. Co. v. Arkansas, 219 U. S. 453.
Penn. R. Co. v. Pub. Serv. Com., 250 U. S. 566.
Morris v. Duby, 274 U. S. 135, 144.
N. C. & St. L. R. v. White, 278 U. S. 456.

VI.

If Congress had empowered the Interstate Commerce Commission to regulate train crews appellant should have applied to the Commission before filing a bill in the Federal Court.

Missouri Pacific Ry. Co. v. Larabee Mills Co., 211 U. S. 612, 620.
Minnesota Rate Cases, 230 U. S. 352, 402, 417, 420.
Atlantic Coast Line v. Georgia, 234 U. S. 280, 291.
Morris v. Duby, 274 U. S. 135, 144.

ARGUMENT.*

I.

This is a suit against the State of Arkansas in contravention of the Eleventh Amendment. This court has never held that the Attorney General of a state can be sued in the Federal Court to restrain the enforcement of a state law which has been held to be constitutional by the Supreme Court of his State and by the Supreme Court of the United States; and which has been enforced as a valid law of the State, over a period of many years.

Under these circumstances, it is clear that the Attorney General is fulfilling his sworn duty as a State officer in enforcing a law which (after being held valid by the highest courts of the State and Nation) **is the law of the State** until it is amended or superseded by another law, or at least until the highest courts of the State and Nation have overruled their previous decisions and annulled the law.

There is not a single case cited by counsel for appellant, or by the statutory court, which, either by express language or by declared principle, holds that the present suit can be maintained in the Federal Courts. On the other hand, the language of the Eleventh Amendment to the Constitution of the United States is clear and mandatory, and the courts of the United States should not assume to exercise a power expressly forbidden in this provision of the Constitution, which reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

*—Black face in quotations are ours unless otherwise indicated.

United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

The Attorney General and prosecuting attorneys of Arkansas were certainly acting as State officials, and not as individuals, when enforcing the Arkansas full crew laws, after they had been expressly held to be constitutional by the Supreme Courts of Arkansas and of the United States.

"The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State."

Twining vs. New Jersey, 211 U. S. 78, 90.

The acts of State officials enforcing laws which had been upheld by the highest courts of the State and Nation were the acts of the State of Arkansas.

"The amendment applies to any suit brought in name against an officer of the State, when 'the State, though not named, is the real party against which the relief is asked, and the judgment will operate'. In re Ayers, 123 U. S. 443."

Minnesota v. Hitchcock, 185 U. S. 373, 386.

The assumed authority for invoking the judicial power of the Federal Courts in this case, which is relied on by counsel for appellant (and which seems to have been accepted without careful consideration by the three-judge statutory court) is the doctrine enunciated in *Ex parte Young*, 209 U. S. 123, which may be summarized in the following quotations from the opinion of the court in that case (p. 159):

"The use of the name of the State to enforce an **unconstitutional** act to the injury of complainants

> is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. * * * If the Act which the state Attorney General seeks to enfotce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the supreme authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

It should be at once apparent that the doctrine of *Ex parte Young*, and the cases which have followed it, is not applicable to the present case. It is conceded in the opinion in that case that the act of the Attorney General in his official character in enforcing the law of the State is the act of the State. A suit to enjoin the Attorney General from so acting would be a suit against the State. Indeed, one may ask how a State can be sued without the service of process upon an officer, or how a State can act except through an officer? But it has been held, according to the doctrine of ex parte Young, that where a State officer seeks to enforce an unconstitutional act, he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

Such a doctrine may be reasonably applied where a public official attempts to enforce a new enactment or an order recently issued by a regulatory commission. Such a doctrine might even be applied to a law which had been enforced for some time but whose validity had never been tested. But can this doctrine be applied to the present situation where the law officers of the State are enforcing laws which have been held constitutional by the highest courts of the State and Nation, and

have been concededly the law of the State for many years? What becomes of the canons of law obedience which are impressed on all citizens if, after the highest Federal Court has held a law to be constitutional, an inferior Federal Court can entertain a suit against an officer charged with enforcement of the law, subjecting him "in his person, to the consequences of his individual conduct"—in enforcing the law of the State. The statutes of the State which have been sustained by highest authority can not well be regarded as the law of the State one day and waste paper the next day without intervening legislative or judicial action. Surely it is not consistent with a "government of law" to enunciate the doctrine that the decisions of the highest courts of the State and Nation may be overruled by the mere force of "changing conditions". If there are "changing conditions" which warrant a reversal by these courts of their previous opinions, it should require action by these courts in changing their opinions to change the law. How are public officials or private citizens to know and to obey "the law" if laws may simply evaporate through the action of unseen, unmeasurable or imponderable forces, disappearing at some indefinite time—perhaps between the sundown of one day and the sunrise of the next!

It can not be argued that the supposed violator of a law, which because of "changed conditions" should be annulled, has no remedy against the enforcement of such a law. Any person prosecuted for violation of a law can raise the question of its validity and be assured of an ultimate review by the Supreme Court of the United States if there is a question of violation of the Federal Constitution involved. (*Fenner v. Boykin*, 271 U. S. 240.) The question here presented is only as to whether a non-citizen can bring a suit against a State in the Federal

Courts (which a citizen could not bring, *Hans v. Louisiana*, 134 U. S. 1) to prevent the enforcement of a law of the State on the ground that, although the Supreme Court of the United States has held the law to be valid, he believes that, upon a further consideration, in the light of "changed conditions", the Supreme Court of the United States will change its opinion and thus destroy the validity of a statute to which that court had previously given its sanction.

It has been frequently held that the power of the Supreme Court to hold invalid the laws of the several States is one of the most profoundly important and delicate functions of the court. It is certainly reasonable to assume that when that power is exercised, the decision of the Supreme Court will remain the "law of the land" until such time as the court itself reverses that decision. The law written by a legislature may become obsolete with the passage of time. Its application to the new conditions of a new day may seem foolish. But if the law is within the discretion of the legislative power, it will remain the law until such time as the legislature amends or repeals the law. Surely the law of the land as laid down by the Supreme Court of the United States should be given equal sanction.

Therefore, we submit that a suit such as the present suit against a State officer, to restrain him from enforcing a law of the State which has been held constitutional by the Supreme Court of the United States, is, and should be held to be a suit against that State officer in his official capacity because of his using the name of the State to enforce a constitutional act—an act of the State in its sovereign capacity—and that the judicial power of the United States does not extend to any such suit in law or equity prosecuted against the State by the citizens of another State.

In order to make it clear that the question here presented has never been ruled upon by the Supreme Court in the cases upon which appellant relies, we venture to review briefly these opinions. Thereby we hope to demonstrate that, on the contrary, the reasoning of these opinions shows that if the principles enunciated in *Ex parte Young*, and subsequent cases, are followed, the present suit must be held not to come within the doctrine of *Ex parte Young*, but to come under the prohibitions of the Eleventh Amendment.

In *Fitts vs. McGhee*, 172 U. S. 516, this court held that a suit to enjoin the Attorney General of the State of Alabama from prosecuting criminal proceedings in the State court did not lie, on the ground that the suit was one against the State, in violation of the Eleventh Amendment. Reviewing the cases cited in support of the contention that the suit was not brought against the State, this court held as follows (p. 529):

> "Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some **specific wrong or trespass** to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by **some positive act a wrong or trespass**, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State."

Fitts vs. McGhee, supra.

The exception to the general rule indicated in the foregoing quotation is expressly and carefully made in the leading case of *Ex parte Young*, in which appears the following holding which has been quoted repeatedly in later opinions (p. 155):

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

Ex parte Young, supra.

Quotations will now be made from a series of cases following this case for the purpose of showing, both the reason for the exception to the general rule and the conditions necessary to bring a case within the exception.

In *Truax v. Raich*, 239 U. S., 33, 60 L. Ed. 131, it was held that a bill in equity could be sustained when "framed upon the theory that the act is unconstitutional and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury," and the court stated:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (*Re Sawyer*, 124 U. S. 200, 210, 31 L. Ed. 420, 405; 8 Sup. Ct. Rep. 482), a distinc-

tion obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." (Many citations.)

It is worthy of note that Mr. Justice McReynolds dissented from the opinion of the court in the Truax case on the ground that it was in fact a suit against the State, not to be maintained under the doctrine of *Fitts v. McGhee*, supra, and in his dissent stated:

> "If *Ex parte Young*, 209 U. S. 123, 53 L. Ed. 714; 13 L. R. A. (N. S.) 932; 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, and the cases following it, support the doctrine that federal courts may enjoin the enforcement of criminal statutes enacted by State legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the amendment ought to be given effect, not refined away."

This dissent is noteworthy because quite recently Mr. Justice McReynolds has delivered opinions of the Supreme Court emphasizing the limited nature of the exception to the general rule which was established in *Ex parte Young*, thus indicating that this court is opposed to such an extension of the exception as would practically wipe out the general rule and subject the law enforcement officers of a State to constant interference and control in performance of their duties through proceedings brought in the federal courts.

Following the *Truax* case, are the following significant opinions:

"It is now settled doctrine 'that individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.' (Citations.) But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young*, 209 U. S. 166, 52 L. Ed. 731; 13 L. R. A. (N. S.), 932; 28 Sup. Ct. Rep. 441; 14 Ann. Cas. 764. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable."

Cavanaugh v. Looney, 248 U. S. 453, 456; 63 L. Ed. 354, 358.

"The unconstitutionality of a State law is not, of itself, ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical, and efficient as that which equity could afford. (Citations.) Equity jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the State, is clothed with the duty of enforcing its laws,

and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity." (Many citations.)

Terrace v. Thompson, 263 U. S. 197, 214; 68 L. Ed. 255, 274.

"But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property.' *Truax v. Raich*, 239 U. S. 33, 37, 38; 60 L. Ed. 131, 133, 134; L. R. A. 1916D, 545; 36 Sup. Ct. Rep. 7; Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite *Terrace v. Thompson*, 263, U. S. 197, ante, 255; 44 Sup. Ct. Rep. 15, decided November 12, 1923, where the cases are collected, and state our conclusion that the present suit falls within the exception and not the general rule. *Houston v. Des Moines*, 176 Iowa, 455, 464; 156 N. W. 883; *Dobbins v. Los Angeles*, 195 U. S. 223; 49 L. Ed. 169; 25 Sup. Ct. Rep. 18."

Packard v. Banton, 264 U. S. 140, 143; 68 L. Ed. 596, 607.

Following the cases last cited, we find their doctrine affirmed in the following case:

"The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional."

Hygrade Provision Company v. Sherman, 266 U. S. 497, 500; 69 L. Ed. 402, 407.

Then we arrive at an opinion of the Supreme Court delivered by Mr. Justice McReynolds in which he takes great pains, speaking for the entire court, to state the limitations upon the exception to the general rule that equity will not enjoin State officers in the enforcement of State statutes, in the following clear and vigorous language:

> "*Ex parte Young*, 209 U. S. 123; 52 L. Ed. 714; 13 L. R. A. (N. S.) 932; 28 Sup. Ct. Rep. 441; 14 Ann. Cas. 764, and following cases have established the doctrine that **when absolutely necessary** for protection of constitutional rights courts of the United States have power to enjoin State officers from instituting criminal actions. But this may not be done **except under extraordinary circumstances** where the **danger of irreparable loss** is both **great** and **immediate.** Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. **The accused should first set up and rely upon his defense in the State courts, even though this involves a challenge of the validity of some statute,** unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of Federal questions. An intolerable condition would arise if, whenever about to be charged with violating a State law, one were permitted freely to contest its validity by an original proceeding in some Federal court. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 500; 69 L. Ed. 402, 406"

Fenner v. Boykin, 271 U. S. 240, 243.

Finally we come to the recent case of *Massachusetts State Grange v. Benton*, 272 U. S. 525; 71 L. Ed. 387, in which Mr. Justice Holmes delivered the opinion of the court, particularly emphasizing the general rule and the limitations upon the exceptions to the rule in the following language (p. 527):

> "The court below found no inconsistency between the two acts, and we have seen no sufficient reason for differing from it upon that point. But it also went on the important rule, **which we desire to emphasize,** that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, **unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.** *Cavanaugh v. Looney*, 248 U. S. 453, 456; 63 L. Ed. 354, 357; 39 Sup. Ct. Rep. 142; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500; 69 L. Ed. 402, 406; 45 Sup. Ct. Rep. 141; *Fenner v. Boykin*, May 24, 1926 (271 U. S. 240; 70 L. Ed. 927; 46 Sup. Ct. Rep. 492).

In support of the opinion of Mr. Justice Holmes, a separate opinion was delivered by Mr. Justice McReynolds, from which the following quotations are pertinent:

> "Unless much said in *Ex parte Young*, 209 U. S. 123 * * * is trivial or nonsense, this is a suit against Massachusetts and beyond the possible jurisdiction of Federal courts, as expressly declared by the Eleventh Amendment. * * * The bill discloses a bald purpose to secure an adjudication in respect of the constitutionality of a State statute. In no just sense did it seek protection of any property right

threatened with unlawful invasion by an officer claiming to proceed under a void enactment."

Mass. State Grange v. Benton, supra., p. 529.

It will be observed that in none of the foregoing cases where the jurisdiction of the Federal courts was sustained, was there a situation presented comparable with that found in the present case. In no case had the law in question been sustained by the Supreme Court of the United States (or even by the Supreme Court of the State involved). In fact, the reason for a resort to the Federal court of equity is commonly the impending enforcement of an alleged law whose validity has received no judicial sanction:

> "Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States even though such injunction may cause the state law to remain inoperative **until the constitutional question is judicially determined.**"

Public Service Co. v. Corboy, 250 U. S. 153, 159.

According to appellant's argument it would appear that **after** the constitutionality of a state law **has** been "judicially determined" litigants may continue to file suits based on the **jurisdictional** averment that the law although previously held constitutional is not sufficiently operative to make its enforcement the official act of a state officer. Such a doctrine would extend the authority of the Federal courts to a continuing supervision over state officers and an intermittent revision of state laws that would be an unprecedented invasion of the independ-

ence of executive department and of the independence of state sovereignty. In no previous case is presented the situation found in the present case where a law has been in effect for many years and has been accepted by the complainant itself for many years as the law. In no other case has been presented the situation in the present case, where the Supreme Court of the State and the Supreme Court of the United States long ago sustained the validity of the law as a proper exercise of the police power of the State, and where the complainant seeks to have the Supreme Court reverse its opinion and to hold the law to be not a proper exercise of the police power of the State.

It is observed, of course, that the complainant in the present case contends that laws have been passed by Congress since the enactment and sustaining of the Arkansas full crew laws, whereby Congress has occupied this field of legislation, and thereby excluded the exercise of the State police power. Yet, even these laws were passed many years ago, the Transportation Act in 1920, and the Railway Labor Act in 1926, and complainant has continued to live under the restrictions of the State law without seeking the immediate aid of a Federal Court of equity to prevent what it now calls "irreparable injury". We will discuss the merits of this contention of the appellant (that Congress has now occupied the field) subsequently in this brief, and we feel confident that this court will sustain the conclusions of the statutory court to the effect that Congress has not, in any way, evidenced an intention to regulate, or to commit to the regulation of the Interstate Commerce Commission, the number of employees who should be required to operate trains safely.

But, if this court agrees with the conclusions of the statutory court (that Congress has not occupied the

field), this court will have still left before it the question as to whether the bill of complaint sufficiently alleges facts which, if proved, would warrant a holding that the exercise of the police power of the State in the laws has been arbitrary and imposes an unreasonable burden upon Interstate Commerce. We do not believe that the allegations of the bill of complaint are sufficient to raise this issue and we believe there is a clear showing that the complainant had, and has, an adequate remedy at law.

But before proceeding to the discussion of these questions, we submit most earnestly that this suit has been begun in clear violation of the provisions of the Eleventh Amendment, and that it is far more important than the decision of any other issue involved in this case, to have a ruling that the limitations of the jurisdiction of the Federal Courts, under the Eleventh Amendment should be observed. We believe, to paraphrase the language used in *Fenner vs. Boykin*, supra, that "an intolerable condition" has arisen in this case whereby, when charged with the violation of a State law **which is**, by the decision of this court, **the law of the State of Arkansas**, the complainant has been permitted to sue the State of Arkansas in a Federal Court and to compel the officers of the State to defend their official acts in a Federal Court, to protect their right to exercise their authority and to fulfill their duties as State officers. The State of Arkansas is being sued by a citizen of the State of Missouri in the Federal Courts, despite the express mandate of the Constitution of the United States to the effect that "the judicial power of the United States shall not be construed to extend" to any such suit. We submit that the bill should be dismissed on the ground that the constitutional rights of the States can not be thus violated in the courts of the United States.

II.

The bill of complaint was properly dismissed because the complainant had a plain, adequate and complete remedy at law. The present case is remarkable because of the entire absence of the ordinary excuses for resorting to a court of equity to prevent the enforcement of the criminal law of a State. It may be admitted that—

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable."
>
> *Terrace vs. Thompson*, supra, p. 214.

> "But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate."
>
> *Fenner vs. Boykin*, supra, p. 243.

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional."
>
> *Hygrade Provision Co. vs. Sherman*, supra, p. 500.

But (quoting again an opinion of this court) respect should also be paid to—

> "the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."
>
> *Mass State Grange v. Benton*, supra, p. 527.

When the bill of complaint in the present case is tested by the foregoing rules, it becomes apparent that the equity jurisdiction can not be sustained. The railroads of Arkansas have been operating for many years in conformity with the Arkansas full crew laws. The railroads in many other states have been operating for many years in conformity with similar laws (see Appendix). The other railroads in the State of Arkansas, and elsewhere in the United States, are continuing to operate under these laws without feeling the necessity of invoking the immediate aid of the injunctive process of the Federal Courts to save them from the "danger of irreparable loss" alleged to be "great and immediate", or to protect them from "injuries otherwise irremediable." The complainant could hardly suggest that this is a case "reasonably free from doubt", when the complainant asserts the unconstitutionality of state laws which have been in effect for many years in many states, especially when the particular state laws assailed have been explicitly held to be constitutional by the Supreme Courts of the State and of the United States.

Furthermore, it is interesting to note that in the very cases in which these Arkansas laws were held constitutional, it was not found necessary for the railroads affected to invoke the equity powers of the Federal Courts but, on the contrary, the laws were violated, small fines imposed, and the test case proceeded in an orderly fashion through the courts of the State to the Supreme Court of the United States. (See, *Chicago R. I. & P. R. Co. vs. Arkansas*, 86 Ark. 412; 219 U. S. 453; *and St. Louis I. M. & S. R. Co. vs. Arkansas*, 114 Ark. 486; 240 U. S. 518).

About all that can be said to support complainant's action in filing its bill is that an equity proceeding in the

Federal Court provides an easy method for the complainant to prevent the Supreme Court of the State of Arkansas from again passing upon the validity of a State law, and provides a "short-cut" to the Supreme Court of the United States. Yet, to use the language of this court, we may suggest that—

> "the fact is important that the controvery concerns the respective powers of the nation and of the states over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the State and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The Federal power is paramount, but public interest demands that whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the Federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to."

Lawrence vs. St. Louis-San Francisco Railway Company, 274 U. S. 588, 594.

In another recent case, this court held that a bill of complaint did not lie by the State of Georgia against the City of Chattanooga, where the case involved "a consideration of the meaning and proper application of the laws of Tennessee", and this court held "it is especially appropriate that the Tennessee courts shall first decide that question."

Georgia vs. Chattanooga, 264 U. S. 472.

It may be properly suggested in this case that since the Supreme Court of Arkansas first sustained these laws, and then this court approved those decisions of the Su-

preme Court of the State, if there is now an occasion for a re-examination of the issues of those cases, it would be at least appropriate, and certainly in the interests of comity and courtesy to require the complainant in this case to submit the issues first to the consideration of the courts of the State of Arkansas.

The threat of a multiplicity of suits provides no basis for the present proceeding, because the bill of complaint shows that suits were brought in Arkansas and fines imposed (which, under the law, are small) and all the complainant had to do to avoid a multiplicity of suits was to continue operating its railroad as it had been operating for years, in conformity with the laws of Arkansas, and appeal from the judgments entered against it for violation of those laws. Yet, so little was complainant injured by these suits that it did not even appeal from the judgments entered. (Rec. 18.)

The situation presented in this case is entirely different from that in which resort is ordinarily had to a court of equity. Where a new act has been passed by the legislature, or a new order entered by a regulatory commission, which imposes new expenses or heavy losses of revenue upon a public service company, or where a company can not continue operating in its customary manner without incurring a multitude of penalties or subjecting itself to numerous prosecutions, there may be some justification for an appeal to a court of equity to prevent great and irreparable injury, particularly where, on the face of the bill of complaint, a case is presented which seems "reasonably free from doubt". But, entirely different issues are apparent on the face of the present bill of complaint, in view of the decisions of this court upon the laws here involved, and in view of matters of common knowledge, of which the court will take judicial notice:

First, this is a suit against the State to which the judicial power of the Federal Courts does not extend. The legal fiction that a suit against State officers is not a suit against the State is here invoked to support an allegation contrary to fact. Second, the complainant is seeking merely to have the court review the **wisdom** of the exercise of an unquestioned reserved police power of the State. (The contention that Congress has occupied this field is thoroughly demolished by the opinion of the statutory court.) Third, the complainant had a full, adequate and complete remedy at law by setting up and relying upon its defense in the state courts.

The three-judge statutory court, in its opinion, stated that a property right of the plaintiff was involved, that prosecutions had taken place and others were threatened, and therefore "where a multiplicity of such prosecutions are involved, a court of equity may intervene, even though the effect is to enjoin the enforcement of criminal laws". (Rec. 115.) We suggest that the court failed to note that no multiplicity of prosecutions could take place except through a sudden determination of the complainant to begin wholesale violations of laws which had been held constitutional and had been enforced for years; and we submit that a complainant can not **create** an equity jurisdiction by deliberately adopting an unlawful course of conduct, when not under any pressure of necessity to prevent "great and irreparable injury", but simply because the complainant wishes to test again the constitutionality of laws which have been long upheld. The fear of consequences "which defendant can easily avert without loss or injury" does not justify a resort to equity.

Arkansas Bldg. Assn. v. Madden, 175 U. S. 269.

One of the two cases cited by the lower court in this connection is *Truax vs. Raich*, 239 U. S. 33, wherein it was held that a bill in equity could be sustained when "framed upon the theory that the act is unconstitutional, and that defendants who are public officers concerned with the enforcement of the laws of the state are about to proceed **wrongfully** to the complainant's injury". We would point out that in the present case, the acts in question, according to the decisions of this court, **are constitutional**, and that these decisions **are the law** until overruled by this court, and that this bill could not be properly framed on the theory that the prosecuting officers of Arkansas were proceeding **wrongfully.**

Our point is, in brief, that the law as laid down by the Supreme Court must be held to be the law in the federal courts, and that a federal court can not take jurisdiction of a bill of complaint on the basis of the mere contention of the complainant that the law should be **changed.** The laws of the State of Arkansas here involved are not merely "laws" because the legislature of the State of Arkansas enacted them, but they are entitled to **unqualified acceptance** as the laws of Arkansas because their validity has been sustained in the courts of last resort.

The "legal fiction" that a state official may be sued as an individual wrongdoer when he attempts to enforce a state statute becomes pure subterfuge when he is sued for enforcing a state statute which has been held constitutional. The attorney general of Arkansas is being sued in this case for performing his unquestioned official duty. Therefore the State is being sued, in defiance of the prohibition of the federal Constitution. And there is no shadow of an excuse for this subterfuge when the complainant has, as in the present case, a plain and complete remedy at law.

Under these circumstances, we submit that it is proper to apply the general principle that "the unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities." *Terrace vs. Thompson,* supra, p. 214.

The principal argument of appellant upon this issue before the statutory court was to the effect that the remedy at law, in order to prevent the exercise of equity jurisdiction, must be a remedy at law **in the Federal Court,** and not merely in a State court. If this contention were sound, then the language previously quoted from the opinion of this court in *Fenner vs. Boykin,* supra, becomes meaningless. Obviously, there can be no remedy **at law** in the Federal Court for any defendant charged with violation of a state law, since the Federal Courts have no jurisdiction to enforce the penal statutes of a state. (*Gwin v. Breedlove,* 2 How. 29, 36; 11 L. Ed. 167.) The only remedy at law, by setting up and relying upon a defense against a penal statute, must be in the **state** courts. Yet, in *Fenner vs. Boykin,* and the preceding case of *Terrace vs. Thompson,* the opinions proceeded on the clearly stated ground that the unconstitutionality of a state law was not alone ground for equitable relief, but that a defense must be made **in the state courts** unless it "plainly appears that this course would not afford adequate protection."

We venture to quote again from the separate opinion of Mr. Justice McReynolds (not a dissenting opinion) in *Massachusetts State Grange vs. Benton,* supra, p. 529.

> "Unless much said in *Ex parte Young*, 209 U. S. * * * is trivial or nonsense, this is a suit against Massachusetts and beyond the possible jurisdiction of Federal Courts, as expressly declared by the Eleventh Amendment. * * * The bill discloses a bald purpose to secure an adjudication in respect of the constitutionality of a state statute."

We submit that this same language is applicable to the present suit, and, unless much that has been said in the ruling cases upon the issues herein is to be regarded as meaningless, this is a suit against the State of Arkansas, beyond the jurisdiction of the Federal Court and is, furthermore, a suit outside the equity jurisdiction of any court, because the complainant has an adequate remedy at law. If appellant's argument were correct, then almost any non-resident defendant in a state criminal prosecution could resort to a Federal Court of equity, although residents of the State could not resort to a State court of equity because of the existence of a plain and adequate remedy at law.

It seems apparent that the doctrine previously announced by this court (in *Risty vs. C. R. I. & P. Railway Co.*, 270 U. S. 378), which appellant has misapplied, did not refer to defendants who may be prosecuted for the violation of State laws, but rather to those suitors for civil relief in a Federal Court of equity who might have found a civil remedy **as plaintiffs** at law in the State courts, which was a remedy not available in the Federal Courts. Certainly, if the doctrine were as broad as appellant's contention, it is difficult to understand why, in *Ex parte Young* and other cases, this court has sustained the equity jurisdiction on the ground that the remedy in the State courts was "inadequate". If the remedy at law must always be found in the Federal Courts,

in order to bar the federal equity jurisdiction, it would not make any difference whether there was an "adequate" remedy or an "inadequate" remedy in the State courts.

We submit that the sustaining of equity jurisdiction in this case will certainly open wide the doors of the Federal Courts to a multiplicity of cases supposedly barred by the ancient rule of equity, which is written into the Judicial Code. (Judicial Code, Sec. 267.) Not only will all non-resident defendants be entitled to file bills in equity in the Federal Courts to enjoin the enforcement of State laws because of alleged conflict with the Federal Constitution, but even after the Supreme Court has sustained the constitutionality of the State law, further bills in equity may be filed alleging "changed conditions" or "new grounds", and a mass of litigation over State laws (including, for example, the innumerable regulations issued by state commissions) may be dragged into the Federal Courts, creating that "intolerable condition" against which this court has uttered a special warning in *Fenner vs. Boykin,* supra, which was then reiterated in *Massachusetts State Grange vs. Benton,* supra. In view of the well known fact that a considerable part of state police power regulations are operative today upon corporations which are citizens of other states, the present bill of complaint, instead of being (legislatively) described as, "a bill to annul the full crew laws of twenty-one states", should be comprehensively described as, "a bill to provide for the direct review of all state police power regulations by the Supreme Court of the United States." (Because, here is a class of cases in which a direct appeal to the Supreme Court from interlocutory orders and final decrees is a matter of right under Section 266 of the Judicial Code.)

Finally on this point, it may be suggested that the discussion in *Ex parte Young* of the comparative "ade-

quacy" of the remedies, by a bill in equity, or by setting up a defense in a criminal prosecution, gave tender consideration to the interests of the **defendant,** but somewhat ignored the interests of the **state.** It was held—

> "We do not say the company could not interpose this defense in an action to recover penalties, or upon the trial of an indictment, but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

Ex parte Young, supra, p. 165.

Perhaps it may be easier for the Missouri Pacific Railroad Company, a corporation with large financial resources and an enormous staff of expert engineers, statisticians and accountants, to present an impressive case to a three-judge statutory court than to interpose its defense in a state prosecution. But is it not appropriate to consider that the State of Arkansas, according to the procedure initiated by the complainant railroad, is to be placed in a very difficult position to make its defense, that is, to defend the sovereign power of the State?

According to customary procedure, according to the experience had in previous and pending cases of this character, it must be plain to members of the Federal bar and to the Federal judges that upon jurisdiction being taken, a three-judge statutory court would refer such a case to a master. (This is a practice persisting despite Equity Rule 46. See, *Los Angeles Brush Mfg. Co. v. James* (D. J.), 272 U. S. 701.) Whereupon the State would be compelled to advance thousands of dollars for master's fees, for stenographic costs, for expenses of witnesses, for the hiring of experts to reply to the well prepared experts employed by the railroad. Whereupon an

enormously expensive record would be made at great cost to the state, and if the statutory court should happen to decide against the state, then an exceedingly expensive appeal must be prosecuted to this court. Yet, according to the theory upon which jurisdiction is taken, the defending state officers are being sued as personal wrong-doers. Clearly, they could not be expected to pay from their own pockets such costs, far exceeding their official salaries. Yet, if the state is not the defendant, how can costs be taxed against the state? And if it be assumed that appropriations could be legally made by the state, the question would still remain: Would the officer be individually liable for costs when sued as an individual wrong-doer if the state should fail to reimburse him? But if the state assumes the burden of defense, is it equitable doctrine that a wealthy defendant can impose on a state (of perhaps inferior financial resources) the enormous cost and burden of a defense in equity to support the law of the state, and can impose this cost and burden upon the tissue fiction that the state itself is not being sued?

> "One of the causes for complaint of the general administration of justice is the expense it entails on the litigants, and so far as it reasonably may do so, this court is anxious to minimize the basis for such complaints."
>
> *Los Angeles Brush Mfg. Co. v. James*, (*D. J.*), 272 U. S. 701.

The question we would present is: Should the State be burdened with the extraordinary expense of a cumbersome, dilatory equity proceeding in order to protect its sovereign power, or should a violator of state law be required to make his defense in a speedy trial at law in the courts of the state? Which process encourages respect

for law and maintains the dignity of the State; and which is calculated to encourage disrespect for the law and to aid those seeking to evade legal responsibilities? This is a proper consideration for a court of equity, and is a question of public policy which merits the determination of the Supreme Court of the United States.

We submit that in view of the very practical considerations above briefly outlined, in view of the fact that the present defendant has a plain, adequate and complete remedy by setting up its defense at law and by appealing from judgments already rendered against it in the State courts, in view of the fact that the constitutionality of the laws which it assails have been sustained by this court, in view of the fact that there could be no great and immediate and irreparable injury suffered by this railroad if it should continue to operate under the requirements of laws which it has been meeting for over fifteen years; in view of the lack of equity plainly shown on the face of the bill of complaint, this bill, even it be held within the jurisdiction of the Federal Courts, should have been dismissed for want of equity, on the grounds rejected, as well as on those approved, by the statutory court.

III.

The bill of complaint was properly dismissed because it did not allege and properly plead facts which would warrant the court in adjudging that the Arkansas statutes were arbitrary exercises of the police power of the State.

The first point in the Appellant's Brief is to the effect that since the bill of complaint alleged a violation of the Fourteenth Amendment, it was error to sustain a motion to dismiss without examining the merits of the plaintiff's case "since the motion to dismiss admits the facts alleged, and all legal inferences attaching thereto." (Appellant's Brief, p. 22.)

> "We are not called upon to cite authorities, for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill."
>
> *Equitable Life Assurance Society vs. Brown*, 213 U. S. 25, 43.

> "The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this Court must decide, is not admitted by the demurrer. If it be taken to allege that facts exist that lead to that conclusion, it stands no better. For if there are material facts of which the court would not inform itself, as in many cases it would, (*Prentis-vs-Altantic Coast Line Co.*, 211 U. S. 210, 277), an averment in this general form is not enough. *Southern R. Co. v. King*, 217 U. S. 524, 534, 535. Only facts well pleaded are confessed."
>
> *Pierce Oil Corp. vs. Hope*, 248 U. S. 498, 500.

"Did the court err in sustaining the demurrer to the amended answer? The circuit court of appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts, which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and, therefore, deprive the railway company of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional."

Southern R. Co. vs. King, 217 U. S. 524; 536.

To the effect that affidavits cannot supplement a bill of complaint, see also:

U. S. v. Marine Engineers Assn., 277 Fed. 830, 884.

McGregor v. Great Northern R. Co., 172 N. W. 841.

Applying the foregoing well settled rules, the appellant's bill of complaint does not state a cause of action in its allegations as to the unreasonableness of the police power regulation found in the Arkansas statutes. We summarized the allegations of the bill of complaint in

our Statement in the opening of the present brief, and pointed out that the allegations prior to the tenth paragraph of the bill of complaint amounted to nothing more than a reassertion of the same contentions previously made in this court, when the validity of these laws was assailed by railroads operating in Arkansas.

The complainant alleged that trains could be operated safely and more economically with smaller crews than required by the Arkansas laws "whenever the traffic and circumstances make such operation advisable" (Record 7). Complainant alleged that money could be saved by operating trains with smaller crews. But similar allegations were made when the Arkansas laws were originally sustained, and at that time, this court held that though there might be "some room for controversy as to whether the statute is, or was necessary" nevertheless, "it can not be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view."

Chicago R. I. & P. R. Co. vs. Arkansas, 219 U. S. 453.

The court, in the foregoing case, also held, p. 465:

> "It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits."

We submit that the possible economies which might be made by abrogating these full crew laws are not relevant to a determination of their validity, since "uncompensated obedience" to laws passed in the exercise of the police power is an obligation upon all citizens, and peculiarly an obligation of public service corporations.

Atlantic Coast Line R. Co. v. Goldboro, 232 U. S. 548.

Denver & Rio Grande R. Co. v. Denver, 250 U. S. 241.

Standard Oil Co. v. Marysville, 279 U. S. 582.

Erie Railroad Co. v. Board of Public Utility Comrs., 254 U. S. 394.

Railroad Com. v. Southern P. Co., 264 U. S. 331.

Lehigh Valley R. Co. v. Board of Public Utility Comrs., 278 U. S. 24.

The appellant, in its bill of complaint, not only failed to plead any facts which would show that these laws are now less needed than when they were sustained by this court, but on the contrary, its allegations of the fact (of which the court would take judicial notice) that "longer and heavier trains are now being operated" clearly indicates a greater need for requiring that they be operated by no less employees, than those required when the laws were originally passed and sustained. Appellant's allegation that "many more cars than those which could be safely operated when said laws were enacted, can now be operated in Arkansas and throughout the United States generally, more safely than smaller trains could then be operated", is a pure conclusion. But even if it could be regarded as an allegation of fact, it is not an allegation to the effect that longer trains can now be operated more safely with smaller crews, than the shorter trains of earlier years. Nor is such an allegation made. In truth, if the bill of complaint had contained any such allegation, it would be an averment so contrary to common knowledge and common sense that the court would not be required to give it any credence.*

*Interstate Com. Com. Report, 1930, p. 152 lists: 23010 freight conductors, 54118 freight brakemen; 21165 yard conductors, 51605 yard brakemen; which shows an average of nearly 2½ brakemen per train.

"Judicial notice can, and must be, taken even as against the averment of contrary conclusions in a pleading."

U. S. vs. Flournoy, etc., Co., 71 Fed. 572.

In addition to other facts, of which the court will take judicial notice, we call attention to the existence of similar full crew laws in a large number of states, as set forth in the Appendix to this brief, which show a general recognition of the need for such laws, and demonstrate that appellant's allegations concerning the "standard practice" of operating with smaller crews are unwarranted conclusions of the pleader. (Rec. 6.)

The court will note that some regulation of train crews has been in force for many years in some 21 states containing about 45% of the railway mileage of the United States; and that regulations identical with, or very similar to, those of Arkansas have been, and are being, enforced in Arizona, California, Nebraska, Nevada, New York, North Dakota, Oregon, Pennsylvania and Washington. These states present great varieties of climatic, geographical, social, industrial, and railway traffic conditions, providing conditions comparable with any that may obtain in Arkansas. In the light of the admissions in the bill of complaint, and in the light of facts of which the court has knowledge, complainant's conclusions as to "standard practice" are (to put it mildly) not well founded.

Similarly the allegations that a "standard crew" of one less brakeman than required in Arkansas is used generally upon railroads, is negatived by complainant's own qualification: "with the exception of the service in states with laws similar to the above laws of the State of Arkansas". (Rec. 8.)

The allegations of the bill of complaint up to the tenth paragraph, therefore, amount to no more than a petition to the court to re-examine the facts already passed upon by this court in sustaining the Arkansas laws. This re-examination is sought, not in the light of allegations of changed conditions which might lead to different conclusions, but in the light of changed conditions which have produced "longer and heavier" trains. Complainant invites only a reconsideration of the previous opinions of the court upon the basis of complainant's allegations of facts which still further fortify those opinions. Of course, it is the privilege of a complainant to ask for the overruling of previous judicial opinions. But it is likewise entirely appropriate for the defendants to move to dismiss such a bill, and for the court to sustain a motion to dismiss.

> "**Stare decisis** is a wholesome doctrine".
> *Kail v. Arizona*, 207 U. S. 201, 205.
>
> "A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts."
>
> *C. B. & Q. Ry. v. United States*, 220 U. S. 559, 577.

See also:

> *Twining v. New Jersey*, 211 U. S. 78.
> *Knop v. Monongahela Coal Co.*, 211 U. S. 485, 488.
> *N. Y. Life Insurance Co. v. Deer Lodge*, 231 U. S. 495, 502.

We submit that the motion to dismiss was properly sustained in this case because, where the state is exercising an admitted, reserved police power of the state, the following doctrine is clearly applicable:

"Every presumption is to be indulged in favor of the validity of the statute. *Mugler vs. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210. And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest."

Graves vs. Minnesota, 272 U. S. 425, 428.

"We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision. (Numerous citations.) * * *

"We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome."

Standard Oil Co. vs. Marysville, 279 U. S. 582, 584, 586.

The statutory court, in passing upon these allegations of the bill of complaint, sustained the motion to dismiss on the ground that "the validity of these two statutes has been sustained" (Record 115). The court found no basis in the allegations of the bill of complaint requiring a re-examination of the question as to whether the state police power had been unreasonably or arbitrarily exercised. We submit that the facts well pleaded in the

bill and those within judicial notice demonstrate that the Arkansas full crew laws are not an arbitrary exercise of the police power and that the bill stated no cause of action on this ground.

The statutory court then undertook consideration of "the second ground of the bill, which was "that Congress has occupied this field since the above decisions." And the court held, as a matter of law, that neither in amendments to the Interstate Commerce Act, nor in the passage of the Railway Labor Act, had Congress evinced any intention of occupying the field of regulation covered by the Arkansas full crew laws. Thereupon, the court reached the conclusion that "the petition states no cause of action, and for that reason, the motion to dismiss should be sustained".

We will, therefore, (without further discussion of the allegations of fact), proceed to a review of the allegations of law found in the bill of complaint in paragraphs X, XI and XII, on the assumption, which seems to be borne out by the Brief of Appellant, that the actuating reason for filing this bill of complaint was the belief of counsel for appellant that Congress had, since the sustaining of these laws, undertaken to occupy this field of legislation, and that, thereby, the power of the state, which had been constitutionally exerted in the full crew laws, had been superseded.

IV.

The bill of complaint was properly dismissed on the ground that the Congress has not undertaken to occupy the field of legislation covered by these (and similar) state statutes, and that, therefore, the state police power can be, and has been, validly exerted in this field.

The bill of complaint alleges that Section 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, gives the Interstate Commerce Commission jurisdiction to prescribe "the rate, classification, regulation or practice" to be adopted and put into effect by interstate carriers. It is further alleged that similar powers are given by Section 15 of the Interstate Commerce Act, as amended by the Transportation Act. It is also alleged that Section 15-a (added in 1920) gives the commission power to control the expenditures of the carriers, and thereby prevents the states from requiring such expenditures as are necessary to comply with the full crew laws of Arkansas and other states. (Record 11, 13.)

The foregoing contentions were argued at length before the statutory court and considered in detail, and found without merit, in the carefully reasoned opinion of that court. Possibly as a result of that opinion, counsel for appellant have laid their principal emphasis in the brief now submitted to this court upon **a contention not even mentioned in the allegations of the bill of complaint.** It is now contended (Appellant's Brief, pp. 25-45 and 51-58) that amendments were made also to Section 1 of the Interstate Commerce Act by the Transportation Act of 1920, which give the Interstate Commerce Commission a power to regulate "car service" and "the supply of trains" and that this delegation of power super-

sedes the previously sustained power of the state to enact full crew laws. Appellant makes the point that by the Transportation Act, the power of the Commission to regulate "car service" was expanded to include a power to regulate "the supply of trains". Then counsel for appellant proceed to the extraordinary conclusion that the power of the Interstate Commerce Commission to regulate "the supply of trains" includes, **by implication**, the power to regulate the number of employees who shall operate the trains. The argument seems to be this: that under Paragraph 14 of Section 1, the Commission has been given power to regulate the "practices with respect to car service by carriers by railroad subject to this chapter", and that, since the "supply of trains" is included within the term "car service" by Paragraph 10, therefore, the Commission has power to regulate all "practices" connected with the "supply of trains".

Of course, the word "practices" can be given an unlimited scope. This court has held, in construing this very word, in the Interstate Commerce Act, that "it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act"; and also that, "regarding only its broad generality, anything may be asserted of it". (*U. S. vs. Pa. Railroad Co.*, 242 U. S. 208, 228.) Furthermore, in construing this word, in the very sections referred to by counsel for appellant, this court has recently held—

> "The word 'practice', considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to

the acts or things belonging to the same general class as those meant by the words associated with it."

B. & O. R. R. Co. vs. U. S., 277 U. S. 291, 299.

It would be a pure waste of time to follow the details of the argument of counsel for appellant on this point. Their argument goes so far afield that counsel argue that the power of the Interstate Commerce Commission to regulate "the supply of trains" prohibits Arkansas from regulating "the length of freight trains" (Appellant's Brief, p. 34), and they urge that it is an unreasonable requirement "that freight trains shall not exceed twenty-five cars in length" (Appellant's Brief, p. 41), and they complain bitterly of "a state law limiting the length of freight trains to twenty-five cars" (Appellant's Brief, p. 45). Yet, there is not a line in the Arkansas laws limiting the length of freight trains! It seems hardly necessary to answer at length an argument of this character, particularly when counsel for appellant state in the same brief that the average freight train in Arkansas contains from fifty to seventy-five cars (Appellant's Brief, p. 80).

If appellant's construction of the powers of the Interstate Commerce Commission in regulating "practices" concerning "car service" and concerning "the supply of trains" were accepted, a large body of laws covering long-standing and valuable state regulation of railroads would be annulled. Such a construction is only possible by shutting the eyes to the plain meaning of the words used in the Interstate Commerce Act and to the decisions of this court construing those words, which counsel for appellant have omitted entirely from their brief.

The term "car service" is defined in Paragraph 10 of Section 1 of the Interstate Commerce Act and this definition is interpreted by the Supreme Court in *Peoria & P.*

U. R. Co. vs. United States, 263 U. S. 528. In that case this court held that the Interstate Commerce Commission did **not** have authority to require switching to be done through the provisions giving it powers in connection with "car service." This court held:

> "But 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of sub-paragraphs a, b, and c. It is to this end only that provision is made by Paragraph 10 for the 'movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property.' This is substantially the same expression as was used in the Esch Car Service Act. **The 1920 Act merely adds locomotives and other vehicles.**"
>
> *Peoria & P. U. R. Co. v. U. S.* 533, supra.

In a footnote to the foregoing case it is pointed out that when present paragraph 10 was under consideration in the House of Representatives in the 66th Congress, the House Committee on Interstate and Foreign Commerce reported an amendment extending the definition of "car service" to include the supply, **movement and operation** of trains by any carrier subject to this Act." (House Report 456, 66th Congress, 1st Session, p. 17.) It is most significant that the black faced words, including the **movement and operation** of trains, were **omitted** when this amendment was finally passed in the Transportation Act of 1920. Thus it is made plain that Congress decided deliberately **not** to give the Interstate Commerce Commission power to regulate the "movement and operation' 'of

trains. Yet appellant is now seeking to have this power written into the Act by judicial construction—not construction to carry out the legislative intention but to thwart it.

The true legislative intent is shown clearly in the case just cited, *Peoria & P. U. R. Co. v. United States*, 263 U. S. 528; see footnote on page 533.

> "Construction may not be substituted for legislation."
>
> *U. S. v. Mo. Pac. R. Co.*, 278 U. S. 269, 280.

Paragraphs 15, 16 and 17 of Section 1, which also refer to "car service", and confer **emergency** powers upon the Commission, have been strictly construed to cover **only** emergency powers.

> "The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed." (Many citations.)
>
> *Avent v. U. S.*, 266 U. S. 127, 130.

See also:

> *U. S. v. Koenig Coal Company*, 270 U. S. 512.
> *Baltimore & Ohio R. Co. v. U. S.*, supra.

It seems unnecessary to multiply citations at this point. The powers of the Commission in regard to "car service" are powers purely for the purpose of insuring a proper distribution of cars and locomotives and have no relation whatsoever to the regulation of the number of employees, or to protecting the public safety through providing sufficient employees to properly man trains.

This construction of "practices with respect to car service" as found in Section 1 of the Interstate Commerce Commission is fortified by the cases hereafter cited construing the word "practices" in Sections 13 and 15 which are alleged by appellant to give the Commission power to regulate train crews.

After the foregoing brief disposition of appellant's contentions which are not based on any visible allegations in the bill of complaint, let us consider those sections of the Interstate Commerce Act, as amended, which are referred to in the bill of complaint.

Sections 13 and 15 of the Interstate Commerce Act do not give the Interstate Commerce Commission authority to regulate the number of employees.

Section 13 of the Interstate Commerce Act was amended in 1920 by the addition of the last two paragraphs now numbered (3) and (4). Authority is given to the Interstate Commerce Commission to investigate any "rate, fare, charge, classification, regulation or practice" made or imposed by authority of any State and if it finds "that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable charge, preference or prejudice as between persons or localities * * * or any undue, unreasonable or unjust discrimination which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare or charge or maximum or minimum, or maximum and minimum thereafter to be charged and the classification or practice thereafter to be observed in such manner as in its judgment will remove such charge, preference, prejudice or discrimination."

A mere reading of the foregoing provisions shows that the authority conferred upon the Commission is simply an extension of the authority previously conferred "to promote and facilitate commerce by the adoption of regulations to make **charges** for transportation just and reasonable and to forbid undue and unreasonable **preferences or discriminations.**" This was (and is) the main purpose of the Interstate Commerce Act—as held in *Texas, etc., R. Co. v. Interstate Commerce Commission,* 162 U. S. 197, 233.

The "classification, regulation or practice" to be investigated or prescribed is clearly one having a relationship to a "rate, fare, or charge." It would be a strange construction of legislation to find in one section which is clearly intended to protect shippers against unfair rates, preferences or discriminations, a wholly different purpose —to authorize the Commission to determine what railroad operating conditions are necessary or desirable to protect the safety of the public and of employees. By all rules of statutory construction, "rates," "classifications" and "practices" are here grouped together in dealing with **one subject,** that is, equal and fair treatment of shippers. *Noscitur a sociis.* However, we are not required to construe the amendments of Section 13 without the aid of prior construction, because similar words were used in Section 15, as amended in 1910 and were construed by the Supreme Court of the United States prior to the adoption of the amendments to Section 13 in 1920. It must be held that the amendments to Section 13 in 1920 were written with full understanding of the construction which had been previously placed upon the word "practice," as found in Section 15—to which we will now refer.

Section 15 as amended by the Act of June 18, 1910, provided that the Commission could investigate and reg-

ulate a "rate, fare, charge, classification, regulation or practice." (We note that these are exactly the same words that are used in the 1920 amendment to Section 13.) These words were construed by the United States Supreme Court in the case entitled *United States v. Pennsylvania Railroad Company*, 242 U. S. 208, which was decided December 11, 1916.

In that case the railroad obtained a decree enjoining the enforcement of an order of the Interstate Commerce Commission requiring the carrier to provide and furnish tank cars to shippers. It was claimed, in behalf of the Commission, that the word "practices" should be construed to give to the Commission authority to compel a railroad to furnish this special facility. The Supreme Court, therefore, stated (p. 229) that "the question, then, is whether the neglect to provide it, or to furnish it was a 'practice' within the meaning of Section 15." The court held:

> "The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as 'practice.' Following a well-known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purposes as its associates. And there were many such acts for which the word could provide —practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one."
>
> *U. S. v. Penn. R. Co.*, 242 U. S. 208, 229.

Later in its opinion the court discussed further the effect of thus broadly enlarging the powers of the Commission, without any basis in legislative discussion or rec-

ommendations of the Commission that such authority should be given the Commission, and continued:

> "Indeed, there is intimation that such result would be radical and, as said by the railroad company, 'the Safety Appliance Acts indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers, it covers the subject by careful specific rules.' And we may further say with the company that 'it is pertinent to inquire why committees of Congress should consider, as they continue to do from time to time, the wisdom of devolving on carriers the duty to furnish steel coaches for passenger traffic, if already the provisions of the act to regulate commerce are broad enough to cover matters of this kind?' And there is strength in the observation of the railroad company that if the argument based upon the word 'practice' or 'practices' were sound, **'it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act,** why should the Commission ask that it be empowered to require the use of the block signal system? (Report of 1913, page 82.) Why should the Commission make this request if, because of its jurisdiction with respect to practices, it is already endowed with power to regulate the details of operation of carriers?"

U. S. v. Penn. R. Co., supra, at page 232:

The foregoing case is cited with approval in *Baltimore & Ohio Railroad Company v. U. S.*, 277 U. S. 291, decided May 21, 1928. In the latter case the Interstate Commerce Commission had entered an order in respect of charges for transporting certain Westbound through traffic, from lines East of the Mississippi at East St. Louis

to lines West of the river at St. Louis. The Commission held that the "practice" of the East side lines in requiring the West side lines to bear the transfer charges on West-bound freight traffic was unjust and unreasonable and that a just and reasonable "practice" would be for the East side lines to bear such transfer charges. The following excerpt from the opinion of the court is pertinent:

> "In holding that the matter in controversy is a 'practice' within the meaning of the Act, the Commission relied on Sec. 1 (6) and (11) and Sec. 15 (1). Paragraph (6) makes it the duty of carriers to establish just and reasonable regulations and practices affecting classifications, rates or tariffs. Paragraph (11) requires them to furnish an adequate car service and to establish just and reasonable rules, regulations and practices, and declares to be unlawful every unjust and unreasonable rule, regulation and practice in respect of car service. The phrase 'car service' is defined by Par. (10) to include the exchange, interchange and return of locomotives, cars and other vehicles and also the supply of trains used by any carrier. Paragraph (1) of Sec. 15 provides that whenever the Commission shall be of opinion that any individual or joint rate or classification, regulation or practice is or will be unjust or unreasonable, the Commission may prescribe just and reasonable rates, classifications, regulations or practices.
>
> "The word 'practice,' considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to con-

fine its application to acts or things belonging to the same general class as those meant by the words associated with it. *United States v. Pennsylvania R. Co.*, 242 U. S. 208, 229, 61 L. Ed. 251, 264, 37 Sup. Ct. Rep. 95. When regard is had to that rule and the restrictions required to give the word a reasonable construction, it seems quite clear that 'practice' as used in the provisions relied on by the Commission, does not include or refer to the method or basis used by the connecting carriers for their divisions of rates or revenues. And this is so whether the revenues are derived from joint rates or from combination through rates."

B. & O. R. Co. vs. U. S., 277 U. S. 291, 299.

From the foregoing cases a rule of construction is provided: that the word "practice" when "considered generally and without regard to context, is not capable of useful construction." The word must be interpreted in connection with other words with which it is associated. It must be applied to acts and things more specifically described in the same or other sections of the Interstate Commerce Act. To quote again from the last opinion (page 300) "Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it."

Congress has never shown in any provision of the Interstate Commerce Act any intention to regulate, or to give to the Interstate Commerce Commission any authority to regulate, the number of employees. Congress has never shown any intention to regulate directly or indirectly the make-up, manning or operation of trains, so as to insure safe operation and protection of the public and employees, except in those instances where Congress has

made some specific provision as in the Safety Appliance Acts.

> "The Interstate Commerce Commission has never assumed control over the manner in which trains shall be made up, or manned, or moved, so far as I know," said Mr. Justice Clarke in *Penn. R. Co. v. Pub. Serv. Com.*, 250 U. S. 566, 570.

In the Safety Appliance Acts Congress has acted to give **specific** and **not general** power and, therefore, has not sought to occupy the entire field of protecting safe operation, so as to exclude the states from exerting their police power. This is pointed out in the opinion of the Supreme Court in *Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605, where the court held that the Safety Appliance Act did not manifest an intention to occupy "the entire field regulating locomotive equipment," because, in the language of the court—"Obviously it did not do so by the Safety Appliance Act since its requirements are specific." (p. 611.)

The numerous cases cited in the brief of appellant in support of its contention that Congress has occupied the field by the use of the vague word "practice" in Sections 13 and 15 are in fact authorities **against** appellant's contention, when the cases are carefully examined. The following examples should suffice:

In *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341, (Appellant's Brief, p. 60) it was held that a form of bill of lading had not been prescribed for the particular shipment in question. But the answer to the question as to whether Congress had evinced an intention to regulate all bills of lading, was found in the provision in Section 1, Paragraph 6 of the Interstate Commerce Act which **specifically** prescribed (in the language of the court) "a gen-

eral rule applicable to all regulations and practices affecting the form or substance of bills of lading, in order that they may be just and reasonable. And the Commission is empowered and directed to enforce the rule." Thus it was made plain that Congress had occupied this specific field so as to exclude all State authority. On the other hand, it is equally clear that Congress has not anywhere in the Interstate Commerce Act made any "general rule" regarding the number of employees, or imposed any duties on either carriers or the Interstate Commerce Commission in this regard.

Another case cited by counsel for appellant is authority for the exact opposite of counsel's contention: *Midland Valley Railroad Company v. Barkley*, 276 U. S. 482, 48 Supreme Court Reporter 342, is cited (Appellant's Brief, pp. 58, 63) with the statement that in this case the Supreme Court had held there was "exclusive jurisdiction" in the Interstate Commerce Commission and that "jurisdiction of the State court under Section 895, Crawford and Moses Digest of the Statutes of Arkansas, was held superseded." It is true that in this case the Supreme Court held that the reasonableness of the rule adopted by the carrier was a matter to be determined by the Interstate Commerce Commission. But the opinion of the court concluded with these significant words (p. 487.):

> "**Nor need we determine whether,** by the amendments of the Interstate Commerce Act made in Transportation Act (February 28) 1920, Chap. 91, Sec. 402, Paragraphs 10-17, 41 Stat. at L. 456, 476, and the Act of September 22, 1922, Chap. 413, 42 Stat. at L. 1025, **Congress evinced the intention to occupy the field** of regulating the distribution of coal cars; and thereby abrogated the pre-existing

limited right to sue in a state court for failure to supply cars."

This case is, therefore, **not** an authority in support of plaintiff's contention, but a distinct authority in support of defendant's contention that the intention of Congress to occupy a particular field to the exclusion of the State must be "clearly manifested." *Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605.

Section 15 (a) does not give the Interstate Commerce Commission authority to regulate the number of employees.

In view of the cases heretofore cited, appellant's contentions as to Section 15 (a) can be briefly disposed of. This section opens with the definition that "the term 'rates' means rates, fares and charges and all classifications, regulations and practices relating thereto." This definition alone should answer appellant's argument. "Practices" which bear an immediate relationship to **rates** come within the **rate regulating** jurisdiction of the Commission. But if any "practice" which can have any **possible** effect upon rates is to be included within the regulatory power, it would follow that every single activity of a railroad would be subject to intimate control by the Interstate Commerce Commission. We refer again to the case of *Baltimore & Ohio Railroad Company v. U. S.*, 277 U. S. 291, heretofore cited (p. 299):

> "The word 'practice' considered generally and without regard to context is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do."

By the terms of Section 15 (a), the Commission in fixing rates is required to give due consideration to the financial needs of the carriers "under honest, efficient

and economical management." Thereby the Commission is relieved of any obligation to satisfy financial needs arising from dishonest, inefficient or wasteful management. But this is wholly **negative** power conferred upon the Commission—to refuse relief from embarrassments caused by dishonesty, inefficiency or waste. The Commission has been given **no affirmative** power to regulate the discretion of management, to determine what practices are efficient and economical and to order them put into effect. Such a power would reverse the entire theory of private operation, which was responsible for the return of the railroads to their private owners and the passage of the Transportation Act of 1920. With all the powers conferred upon it the Interstate Commerce Commission has not yet been made the manager of the railroads. This court held that "in no proper sense is the public a general manager," in *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108. This case is cited with approval by this court in support of the following holding:

> "It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."
>
> *Missouri ex rel. v. Public Service Commission*, 262 U. S. 276, 289.

There is no justification for the allegation in the bill of complaint, Paragraph XI, that under Sections 13, 15 and 15 (a) the Interstate Commerce Commission "is given authority not only to fix the rates so as to provide a reasonable return upon the property, but also to regulate the expenditures consistent with proper and efficient

operation and economical management." There are specific provisions in the Interstate Commerce Act giving the Commission authority to require, for example, the installation of safety devices, which may, of course, impose expenditures upon railroads. But no **general** authority to regulate expenditures, or to order carriers to adopt practices which the Commission regards as efficient or economical, has ever been **granted, or** ever **exercised** by the Commission.

Not one of the "economy and efficiency investigations" cited in appellant's brief (pp. 49, 50) resulted in a Commission **order.** The Commission merely investigated and reported what it found.

Cases heretofore and hereafter cited show the extent to which this court always required the showing of a **specific** grant of authority before it would find the Commission authorized to exercise authority. These holdings are, of course, consistent with the established doctrine that an administrative body cannot be given the power to legislate, to create its own authority. Powers must be specifically conferred and only the details left to administrative discretion. The railroads of the country themselves have been the most persistent opponents of any efforts on the part of the Commission to take unto itself general powers and to exercise any general control of the operations of the carriers.

> "The Congress may not delegate its purely legislative power to a Commission, but, having laid down the general rules of action under which a Commission shall proceed, it may require of that Commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S. 194, 214.

To the same effect:

Wichita R. & L. Co. v. Public Utilities Commission, 260 U. S. 48, 58.

"A proper statute would seem to require **detailed directions**, and we should expect the intention to be manifested in **plain** terms and not to have been left to be implied from varied regulatory provisions of **uncertain scope.**"

Interstate Com. Com. v. U. S. ex rel., Los Angeles, 280 U. S. 52, 69.

The final contention in the bill of complaint as to federal legislation occupying the field of the state police power is that this has been done in the passage of the Railway Labor Act of 1926.

The Railway Labor Act has no possible effect upon the exercise of state police power.

Appellant's contention in regard to the Railway Labor Act should be disposed of by a mere inspection of the provisions of that law. In brief summary they are:

1. That it is the duty of carriers and employees to make and maintain agreements concerning rates of pay, rules and working conditions.

2. That agreements should be made and disputes should be determined in conferences between representatives of the respective parties duly authorized to act.

3. That in the case of unsettled disputes, the services of the federal Board of Mediation may be invoked or proffered to aid the parties to reach an agreement. This

Board is given absolutely no power to decide disputes. It exercises no regulatory authority whatsoever.

4. That if conference and mediation fail, the parties may agree to arbitrate. But no arbitration can be forced upon the parties.

5. That, if a dispute cannot be settled by conference or through the aid of mediation or arbitration and threatens to interrupt commerce, the President may appoint an emergency board, which will make a report to the President. The recommendations of the emergency board are **not** made enforceable.

It is quite clear, upon a mere reading of the Act, that it does not involve the exercise of any compulsory power of the State to determine wages and working conditions by legislative action. It provides only for agreements between carriers and employees and for the aid of public officials in bringing about such agreements. (See, *T. & N. O. R. Co. v. Bro. of Ry. Clerks*, 281 U. S. 548.) Necessarily all such agreements are subject to the limitations found in federal statutes regulating interstate commerce, or state statutes passed in the exercise of the police power.

The bill of complaint in Paragraph XII (Rec. 14) admits that federal statutes would limit the agreements of the parties but alleges an intention of Congress to relieve the parties from the prohibitions of any state statute. Such a contention is insupportable, as may be shown by one example. Consider the existence of a state statute requiring a flagman at grade crossings, such as was required by the ordinance of Memphis, described in a case hereafter quoted. *N. C. & St. L. R. Co. v. White*, 278 U. S. 456. Could it be contended that railroad employees and railroads could make an agreement providing that no flagman should be maintained? Can railroad employees

and railroads enter into agreements to bargain away the police power of the State and to nullify laws passed in the exercise of such power? Can it be contended that Congress, in authorizing and aiding in the making of agreements between carriers and their employees, has intended to substitute private agreements as to what shall constitute safe operation for the exercise of the police power of the states? It must be obvious that Congress **has not passed** such a law and **could not pass** such a law. The citation of the Railway Labor Act by the plaintiff indicates the entire want of merit in its contentions that federal regulation has occupied this field to the exclusion of the state police power.

Counsel for appellant make the startling assertion that Congress "by the Labor Act of 1926 has thus definitely empowered the United States Railroad Labor Board to fix and determine 'rules and working conditions' in all the different branches of the service" * * *. The fact is that the "United States Railroad Labor Board" was **abolished** by the Railway Labor Act of 1926. The present "Board of Mediation" which was **created** by the Act of 1926 has no power "to fix and determine" any "rules and working conditions." Of course counsel for appellant can hardly be expected to construe or apply an Act of Congress correctly until they are sufficiently familiar with it to be able to state its provisions with reasonable accuracy.

V.

The statutory court properly declined to hold that Congress had occupied this field of State legislation and assumed power to regulate the number of employees required to operate trains in the absence of clear language manifesting such an intention.

The intention of Congress to exclude exercise of State police power must be clearly manifested. *Napier v. Atlantic Coast Line R. Co.* 272 U. S. 605.

The principles laid down by this court may be summarily stated in the following quotations from three cases:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."
>
> *Sherlock v. Alling*, 93 U. S. 99, 103.

> "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to regulation of Congress within the sphere of its delegated power. * * *
>
> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied un-

less the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

Savage v. Jones, 225 U. S. 501, 533.

"The question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 623, 42 L. Ed. 878, 881, 18 Sup. Ct. Rep. 488.

Examples of the application of the foregoing rules will be found in the following cases:

It was held that laws regulating navigation with a view to safety and providing for liability in certain cases did not prohibit application of a state liability statute to an accident occurring in navigable waters of a state. *Sherlock v. Alling*, supra.

It was held that the Interstate Commerce Act did not prohibit state laws requiring locomotive engineers to undergo examinations. *Smith v. Alabama*, 124 U. S. 465.

It was held that the Federal Act forbidding transportation of diseased cattle did not prevent a state from imposing civil liability for damages because of importation of diseased cattle. *Missouri, K. & T. R. Co. v. Haber*, supra.

It was held that the Federal Animal Industry Act did not prevent states from penalizing importation of cat-

tle without inspection by state officials. *Reid v. Colorado*, 187 U. S. 137.

It was held that a Federal prohibition of importation of adulterated food did not prevent states from preventing sales of adulterated food. *Crossman v. Lurman*, 192 U. S. 189.

It was held that the Federal Animal Industry Act did not prevent certain state legislation on the same subject. *Asbell v. Kansas*, 209 U. S. 251.

It was held that the power granted to the Interstate Commerce Commission to compel equal switching service did not, in absence of exercise by the Commission of its power, prohibit states from legislating on the subject. *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612.

The case last cited deserves special attention because the court there lists a large number of cases, wherein the police power of the state has been upheld, notwithstanding the constitutional authority of Congress to regulate interstate commerce, and in answer to the claim that the Interstate Commerce Commission had been created and given "a large measure of control over interstate commerce," the court held. (p. 623).

> "But the fact that Congress has entrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. **A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the**

authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the Commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the Commission the control of the state over these incidental matters remains undisturbed."

This decision in 211 U. S. 612 was cited with approval in *Morris v. Duby*, 274 U. S. 135, 144, but "counsel for the Missouri Pacific" are still arguing that the Supreme Court is wrong and state police power may be annulled without specific exercise of the federal power to regulate the same subject.

It is appropriate to call attention here to the language of this court in upholding one of the laws now in question, where it was held:

"Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations

as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within their jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, federal and state."

C., R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 466.

We will continue with our review of decisions concerning the survival of state police power.

It was held that the Food and Drugs Act of 1906 did not prevent states from regulating sales and requiring statements of ingredients to be affixed to certain articles. *Savage v. Jones,* 225 U. S. 501.

It was held that notwithstanding federal regulation of a carrier's liability for loss of interstate shipments, a state could provide for the allowance of an attorney's fee. *Missouri, K. & T. R. Co. v. Harris,* 234 U. S. 412.

It was held that the Federal Safety Appliance Acts, dealing with locomotive equipment did not preclude state legislation concerning locomotive headlights. *Atlantic Coast Line R. Co. v. Georgia,* 234 U. S. 280.

[It is to be noted that a subsequent amendment to the Boiler Inspection Act, increasing federal control by specific legislation was necessary to exclude the state authority upheld in the foregoing case. *Napier v. Atlantic Coast Line Railroad Company,* 272 U. S. 605.]

It was held that the Federal Food and Drugs Act did not prevent a state from penalizing the shipment of fruits unfit for consumption. *Sligh v. Kirkwood*, 237 U. S. 52.

It was held that "the question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the state must be answered by a judgment in the particular case." *Pennsylvania Railroad Co. v. Public Service Commission*, 250 U. S. 566, 569.

A reference to the case last cited is particularly apt, because in the dissenting opinion of Mr. Justice Clarke appears the previously quoted statement (which is not questioned in the majority opinion) p. 570:

> "The Interstate Commerce Commission has never assumed control over the manner in which trains shall be made up, or **manned**, or moved, so far as I know,—certainly there is nothing in the record in this case to indicate that it has done so."

It was held that a Public Service Commission could require a railway company to construct and maintain a roadway for vehicles crossing its tracks and impose certain duties concerning the use and protection of the crossing; the opinion of this court including the following statement of law:

> "The state, in the exercise of its police power, directly or through an authorized commission, may require railroad carriers to provide reasonably adequate and suitable facilities for the convenience of the communities served by them."
>
> *Norfolk & W. R. Co. v. Public Service Commission*, 265 U. S. 70, 74.

It was held that state regulation to promote safety "is valid, even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Buck v. Kuykendall,* 267 U. S. 307; *Morris v. Duby,* 274 U. S. 135, 144.

We may conclude this review of the cases showing the extent to which the reserved police power of the states must be upheld, unless there is a clear exercise of the federal power to occupy the entire field of regulation, with the citation of a recent case which is peculiarly pertinent to the present case.

In *Nashville C. & St. L. R. Co. v. White,* 278 U. S. 456, a railroad had been held liable for death and injuries at a railroad crossing, for which the proximate cause was the railroad's failure to comply with an ordinane of the City of Memphis, requiring a flagman to be kept constantly on duty. The opinion stated: "The validity of this ordinance is the only question open before us." The railroad had substituted an electric signal for the flagman and claimed this was a cheaper and in some ways a better protection. The opinion of the court reads in part as follows (p. 459):

> "The railway contended that the ordinance enacted at the beginning of 1880 was valid no longer, in view of the modern improvement, and that to enforce it now would be to enforce an unnecessary burden on interstate commerce and would be so arbitrary as to amount to a denial of due process of law. *Galveston Electric Co. v. Galveston,* 258 U. S. 388, 400, 66 L. Ed. 678, 685, 42 Sup. Ct. Rep. 351. (It may be mentioned that the train concerned was engaged in interstate commerce.) But the crossing in

question was said by the court to be a dangerous one, where there was pretty constant travel by night and day, and it was held that as applied to such a crossing it could not be said that the ordinance was so indisputably unnecessary and unreasonable that the legislative judgment could be overruled.

"We are compelled to take the same view. The legislative arguments in favor of the railway are manifest, and we may conjecture that it is only a matter of time before the old methods of guarding grade crossings will have disappeared unless the grade crossings precede them. But if the ordinance were passed today and came up for a decision upon its validity, it could not be denied that a man in the middle of the street, or near to it, and intent on stopping traffic, might stop some travelers who might not notice electric signs. **There is a marginal chance that occasionally a life may be saved.** In this very case it is at least possible that a man on the ground would have stopped the plaintiffs, they not being intent on suicide. No doubt legislatures do neglect such marginal chances. Many modern improvements must be expected to take their toll of life. When a railroad is built experience teaches that it is pretty certain to kill some people before it has lasted long. But a court cannot condemn a legislature that refuses to allow the toll to be taken, even if it thinks that the gain by the change would compensate for any such loss. It follows that we must affirm the judgments below. See, *Zahn v. Board of Public Works*, 274 U. S. 325, 328, 71 L. Ed. 1074, 1076, 47 Sup. Ct. Rep. 594."

N. C. & St. L. R. Co. v. White, 278 U. S. 456.

State Police Power alone can protect the public at the present time.

The following facts must be evident from the previous decisions sustaining the Arkansas Full Crew Laws; from the existence of regulations of the number of employees in twenty-one other states, cited in the Appendix to this brief and from matters within judicial knowledge:

1. These laws were enacted to protect the public safety of all engaged in business or domiciled within the limits of the State of Arkansas.

2. The regulation of the number of employees to whom may be committed the management of trains has a real relation to the safety of train operation and to the safety of the public traveling on highways crossed by trains.

3. With the constantly increasing length of trains and the enormous increase in the number of vehicles upon public highways which cross railroad tracks, there is a much greater need today than ten or twenty years ago for a sufficient number of employees to protect train operations and to protect the public at highway crossings.

The court will take judicial notice of the following significant figures:

Revenue tons per train in 1910=380; in 1929=730; according to Annual Report of Interstate Commerce Commission, 1930, p. 135.

Motor Vehicle Registration in 1913=1,258,000; in 1925=19,954,000, according to Statistical Abstract of U. S., 1925; and in 1929=26,501,443, according to Ann. Rep., Inter. Com. Com. 1930, p. 43.

4. The difference between a full crew and an inadequate crew must inevitably bring death and injury to residents and travelers in the State of Arkansas who are entitled to protection through the State police power.

5. Even if railroads **could** operate and **do** operate with less than the Arkansas "full crew" there is "a marginal chance that occasionally a life may be saved" in Arkansas because of its full crew laws.

Recognizing the above facts, we submit that, in the language of this court, "a court cannot condemn a legislature that refuses to allow the toll (of life) to be taken." These laws were passed many years ago, but they were upheld by the electorate of Arkansas voting upon them on referendum in 1926. The legislative judgment originally exercised by the legislature was thus affirmed by popular verdict upon a referendum.

The present complaining Railroad must admit that the court could not be asked even to consider granting an injunction against the enforcement of these laws, unless it were made clear to this court that the federal government in the exercise of its powers to regulate interstate commerce had taken over itself the **duty** and **obligation** of protecting the people of Arkansas and all the other states, by requiring adequate manning of all trains, both interstate and intrastate. But this would be an action by the federal government of grave and far-reaching importance, not to be implied as evidenced in a vague phrase or two.

Since highway crossings are protected, not only by watchmen stationed there, but also by the crews of trains passing over, and switching over, such crossings, it is clear that Congress, in order to exclude the police power of the states, would be required to assume **and to exer-**

cise far-reaching powers, not only over crews of trains, but over other means of protecting highway crossings. Yet there is not a word in all the Interstate Commerce Laws passed to this day even providing specifically that trains shall be adequately manned, or conferring any power upon the Interstate Commerce Commission to require that trains be adequately manned. It is contrary to all the principles laid down in the foregoing cases to contend that the conferring of such vast powers upon the Interstate Commerce Commission, and the excluding of the states from police powers which have been exercised by practically all the states (either by regulating the number of employees or in requiring protections for grade crossings), is to be implied from vague and general terms, such as the word "practices" as used in Sections 1, 13 and 15 of the Interstate Commerce Act.

In the protection of public safety at highway crossings the police power of the state is paramount.

Erie Railroad Co. v. Board of Public Utility Comrs., 254 U. S. 394.

Railroad Com. v. Southern P. Co., 264 U. S. 331.

Lehigh Valley R. Co. v. Board of Public Utility Comrs., 278 U. S. 24.

VI.

If Congress had empowered the Interstate Commerce Commission to regulate train crews, appellant should have applied to the Commission before filing a bill in equity and its premature bill should have been dismissed.

This final point may be made in support of the action of the statutory court dismissing the present bill of complaint, although it may seem unnecessary in view of the many reasons for the order of the court. If it were a fact that Congress **had** delegated to the Interstate Commerce Commission the power of regulating the number of employees to operate trains, there would be no basis for the present bill of complaint, because the complainant did not previously invoke the investigation and decision of the Interstate Commerce Commission upon this subject matter. The contention of counsel for appellant as stated below, was that Congress had legislated that train service and train supply must be "safe" and "adequate" and that "the Commission is required to see that they are". If any such authority **had** been delegated to the Commission, it would then have been the duty of the present appellant to have applied to the Interstate Commerce Commission for an investigation and determination of the number of employees needed for "safe" and "adequate" service, because, as held by this court, "a mere delegation by Congress to the Commission of a like power has no greater effect, and does not, of itself, disturb the authority of the state".

Missouri Pacific Railway vs. Larabee Mills, 211 U. S. 612.

The following brief review of the opinions of the Supreme Court pertinent to this issue will make it clear that

if Congress should, at any time, delegate authority to the Commission to enter upon the field in which the state police power has been effective and undisturbed up to the present time, the mere enactment of such a law would not immediately wipe out all safety regulations imposed by authority of the state. Such a result would be unconscionable, exposing the people of the states to the sudden abrogation of vitally needed safeguards, without the substitution of a federal protection which could be adequate and effective until, after years of investigation and the issuance of innumerable orders, the Interstate Commerce Commission might provide relief. Clearly, the only doctrine compatible with the public safety would be an affirmation of the rulings hereafter quoted, to the effect that until the delegated power of the Federal Government is exercised in substitution for the existing state power, there should be no destructive annulment of the power of the state.

> "That has been the law since the beginning of railroad transportation. It was not intended that pending Federal action the use of such agencies, which unless carefully guarded was fraught with danger to the community, should go unregulated and that the state should be without authority to secure needed local protection."
>
> *Atl. Coast Line vs. Georgia,* 234 U. S. 280, 291.

In the Minnesota Rate Cases the authority of the state in the absence of actual conflict with federal authority, actually exercised was upheld:

> "Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of

its people, although interstate commerce may incidentally or indirectly be involved."

Minnesota Rate Cases, 230 U. S. 352, 402.

Since Congress had not legislated concerning intrastate rates the court held:

> "It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or **attempted to override the accustomed authority of the State without the provision of a substitute.** On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 620, 621."

Minnesota Rate Cases, supra, 421.

It is significant that this court cited the Larabee Mills case in support of the foregoing rule because that case was not one involving state legislation concerning rates, but **a conflict between state and federal authority over "car service"**—which is the very question brought forward by plaintiffs in the present case. Mr. Justice Brewer, delivering the opinion of the court, referred to "the oft repeated rule that the state, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens."

Thereupon the court laid down the rule which had long been in effect and which is maintained in many recent opinions of this court and which, although quoted under Point V, deserves repetition in the present connection:

"On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But **the fact that Congress has entrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission.** Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. **A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State.** It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and the delegation of that control to a commission necessarily withdraws from the state all power in respect to regulations of a local character. **This proposition can not be sustained.** Until specific action by Congress or the commission the control of the state over these incidental matters remains undisturbed."

Missouri Pacific Ry. vs. Larabee Mills, 211 U. S. 612, 623.

The foregoing case is cited with approval in *Morris v. Duby*, 274 U. S. 135, 143.

Returning now to the Minnesota Rate Cases, we quote further:

"If the authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a **dormant Federal power**, that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province."

Minnesota Rate Cases, supra, page 417.

The foregoing doctrine is maintained in many subsequent cases including:

Great Northern R. Co. v. Merchants Elevator Company, 259 U. S. 285, 291.

Western & Atlantic R. Co. v. Georgia Pub. Serv. Com., 267 U. S. 493, 497.

Arkansas R. R. Com. v. C. R. I. & P. R. Co., 274 U. S. 597, 603.

Railroad Comrs. v. Great Northern R. Co., 281 U. S. 412.

Smith, et al. v. Ill. Bell Tel. Co., decided December 1, 1930.

Finally a more extended quotation may be warranted from a case previously cited which involved the same is-

sue, between **active** state police power and **dormant** federal power, which is raised in the present case:

> "In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. **It was not intended that pending Federal action the use of such agencies, which unless carefully guarded was fraught with danger to the community, should go unregulated** and that the States should be without authority to secure needed local protection. The requirements of a State, of course, must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another State in the exercise of a similar power may not impose the same regulation. We may repeat what was said in *Smith v. Alabama,* 124 U. S. 465, 481, 482; 'It is to be remembered that railroads are not natural highways of trade and commerce * * *. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards and precaution. * * * The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise

endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.' See also, *Nashville &c Rwy. Co. v. Alabama,* 128 U. S. 96; *Hennington v. Georgia,* 163 U. S. 299; *N. Y. N. H. & H. R. R. Co. v. New York,* supra; *Lakeshore & M. S. Rwy. Co. v. Ohio,* 173 U. S. 285; *Missouri Pacific Rwy. Co. v. Larabee Mills,* 211 U. S. 612; *Missouri Pacific Rwy. Co. v. Kansas,* 216 U. S. 262; *Chicago R. I. & Pac. Rwy. Co. v. Arkansas,* 219 U. S. 453; *Minnesota Rate Cases,* 230 U. S. 352, 402, 410.

"If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. **That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders,** but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

* * *

"It does not appear, however, either that Congress has acted **or that the Commission under the authority of Congress has established any regulation** so far as headlights are concerned. As to these, the situation has not been altered by any exertion of Federal power and the case stands as it has always stood without regulation unless it be supplied by local authority. The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken. *Missouri Pacific v. Larabee Mills,* supra; *Savage vs. Jones,* 225 U. S. 501, 533."

Atlantic Coast Line v. Georgia, 234 U. S. 280, 291, 293.

CONCLUSION

Judicial Knowledge of Present Conditions

This court will of course "take judicial cognizance of all matters of general knowledge" (*Muller v. Oregon*, 208 U. S. 412, 420). Unembarassed either by the silence of the complainant or by allegations and conclusions which are contrary to common knowledge, the court will take notice of those obvious present conditions which show that there is even **greater** need for the Arkansas full crew laws today than there was when they were enacted.

Present Conditions

Today we observe freight trains with as many as one hundred cars or more, winding through the countryside and endangering and blocking myriads of highway crossings and the street crossings of busy cities. Not merely pleasure travel, but interstate and intrastate transportation by busses and trucks, and the urgent business of police and fire departments, ambulances and physicians' cars, are blocked by the operation of such trains with crews inadequate to prevent breakdowns and repair defects promptly, or to cut stalled trains at highway crossings. These are trains so long that the exchange of signals between the engine and the caboose (half a mile to a mile apart) is impossible without the aid of intermediate employees. The more cars there are in one train the more attention is required from the one train crew to watch for, and to give emergency attention to, hot boxes, defective brakes, knuckles that are broken, drawbars that are pulled out, or other dangerous conditions that are common incidents of freight train operation. When such trains must be cut in two in order not to block, illegally, highway crossings, employees must be

available to guard the crossings, or the public safety will be unduly imperilled.

Today we observe a constant stream of motor vehicles over every grade crossing of a well-paved highway whereas fifteen years ago there were comparatively few such roads; and vehicles were comparatively infrequent.

The need for **larger** crews to protect the safety of train operation and the safety of the public, travelling by train and travelling the state highways—**larger crews** than were needed fifteen or twenty years ago—is so obvious that the absence of any allegations in the bill of complaint to the effect that **smaller** crews are now needed is easily interpreted: The complainant did not wish to affront common sense by making any such insupportable allegations.

Summary of Appellees' Contentions

We submit that there is no precedent whatsoever for the institution, or maintenance, of this proceeding.

It is a suit against the State of Arkansas.

It is a suit to prevent State officials from enforcing laws which have been held valid by the highest courts of the State and the United States.

It is "a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which these officers will act only by formal judicial proceedings in the courts of the State."

It is a suit in equity to prevent the enforcement of a criminal statute, although the complainant has a plain, adequate and complete remedy at law.

It is a suit which burdens the Federal Courts and the State officials with the excessive cost and delay of an

equity proceeding, which interferes with the speedy and orderly trial of an issue at law in the State Courts and denies to the State Courts their rightful jurisdiction to enforce and to pass on the validity of State laws.

It is a suit to annul the exercise of the reserved police powers of the States in a field of legislation where no substitute Federal power has been exerted for the necessary protection of public safety.

It is a suit in contravention of the plain language and clearly defined purpose of the Eleventh Amendment, and is not within the jurisdiction of the Federal Courts.

It is a suit in contravention of the foundation principles of equity jurisdiction.

It is submitted that the bill of complaint exhibited an entire want of federal jurisdiction and an entire want of equity jurisdiction and that the bill was properly dismissed.

Respectfully submitted,

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APPENDIX

Full Crew Laws of the Several States.

The laws of the various states regulating the number of employees required to operate trains are cited and briefly described in Bulletin No. 370 of United States Bureau of Labor Statistics, as shown in the following excerpt from that bulletin, pp. 83-84:

> "A number of States have laws regulating the minimum number of employees required for the operation of trains of different classes and numbers of cars, and some also for switching operations. The details vary somewhat, though there has been an effort at standardization. Instead of a statutory fixing of the numbers, some States provide for a determination by the railroad or similar commission of the State; and in a few recent instances laws fixing numbers have been repealed and the matter placed in the hands of the commission for action after investigation. Indiana repealed its existing laws in 1921 (chs. 81, 82) without enacting any substitute. A similar fate met the law of Missouri by referendum in 1914, the legislature also declaring its repeal in 1919 (p. 247).
>
> "The law of Oregon is fairly representative of the statutes on this subject. It is as follows:

OREGON—LAWS

Sufficient Crews for Trains

> "Section 5944. **Passenger, etc., trains.** It shall be unlawful for any person, corporation, company, or officer of court operating any steam railroad or railway in the State of Oregon and engaged as a common carrier in the transportation of freight

or passengers to operate over its road, or any part thereof, in excess of fifteen continuous miles, or suffer or permit to be run over the same, outside of yard limits, any passenger, mail or express train consisting of four or more cars with less than a full passenger crew consisting of five men, to-wit: One engineer, one fireman, one conductor, one brakeman, and one flagman (such flagman to have had at least six months' experience in train service) and none of said crew shall be required or permitted to perform the duties of train baggageman or express messenger while on such road.

"Section 5945. **Freight trains.** It shall be unlawful for any person, corporation, company, or officer of court operating any steam railroad or railway in the State of Oregon, and engaged as a common carrier in the transportation of freight or passengers to operate over its road or any part thereof in excess of fifteen continuous miles, or suffer or permit to be run over the same outside of yard limits, any freight train consisting of forty or more cars, exclusive of locomotive and caboose, with less than a full train crew, consisting of six men, to-wit: One engineer, one fireman, one conductor, two brakemen and one flagman (such flagman to have had at least six months' experience in train service): **Provided, however,** That all main line local freight trains shall have a full crew consisting of six men, to-wit: One engineer, one fireman, one conductor, two brakemen, and one flagman (such flagman to have had at least six months' experience in train service): **Provided further,** That light engines operated outside of yard limits will be provided with a full crew of three men, to-wit: One engineer, one fireman, and one pilot,

but this provision is not to apply to helper engines within helper districts.

"Section 5946, **Violations.** (Violations entail penalty of fine, $20 to $100 for each offense.)

"States having similar laws, i. e., fixing the numbers by statute, are:

Arizona—R. S., secs. 2171-2182.
Arkansas—Digest, secs. 8577-8586.
California—Acts of 1911, ch. 49 (am. 1913, ch. 168; 1915, ch. 501).
Maine—R. S., ch. 57, Sec. 60.
Mississippi—Acts of 1914, ch. 170.
Nebraska—C. S., secs. 5336-5341.
Nevada—R. L. 1919, p. 2976, secs. 1-7.
New York—Con. L., ch. 49, sec. 54a (added 1913, ch. 146; am. 1921, ch. 290).
North Dakota—Acts of 1919, ch. 169.
Ohio—G. C., secs. 12553-12557-3 (am. 1911, p. 508; 1913, p. 191; 1919, p. 687).
Oregon—Laws, secs. 5944, 5945.
South Carolina—Civ. C., sec. 3217.
Texas—R. Civ. S., secs. 6571-6575.
Washington—Acts of 1911, ch. 134.
Wisconsin—Statutes, secs. 192.41 - 192.44, 192.46.

"The power of regulating numbers is placed in the hands of a railroad, public service, or similar commission, in the following States:

Connecticut—G. S., sec. 3810.
Maryland—A. C., art. 23, sec. 435c, added 1922, ch. 143.

Massachusetts—G. L., ch. 160, sec. 185.

New Jersey—Acts of 1917, ch. 94 (am. 1922, ch. 270).

Pennsylvania—Acts of 1921, No. 184.

West Virginia—Code, sec. 639 (am. 1921, ch. 150).

(Note: **Mississippi** re-enacted and extended the Act of 1914 in Acts of 1930, Ch. 219. In the **Connecticut** Revision of 1930 it appears that commission regulation is now authorized under Sec. 3588. The **Maryland** law should now be cited as, A. C., Art. 23, Sec. 376.)

The foregoing summary of state laws (published May, 1925) may be supplemented by references to the varying provisions of the different laws above cited:

ARIZONA requires three brakemen on freight trains exceeding thirty-nine cars and on all local freights.

CALIFORNIA requires three brakemen for fifty cars, four brakemen for seventy-six cars, and an additional brakeman for every additional twenty-five cars; providing, also, for additional brakemen for the operation of long trains on heavy grades.

NEBRASKA requires three brakemen on local freights.

NEVADA requires three brakemen on freight trains exceeding fifty cars.

NEW YORK requires three brakemen on freight trains exceeding twenty-five cars.

NORTH DAKOTA requires three brakemen on freight trains of over forty cars.

OREGON requires three brakemen on freight trains exceeding thirty-nine cars; and on all main line local freights.

PENNSYLVANIA required three brakemen on freight trains exceeding thirty cars under the law of 1911. Since the amendment of 1921 vesting authority in the Public Service Commission, various requirements have been imposed, including such requirements as three brakemen.

WASHINGTON requires three brakemen on freight trains exceeding twenty-four cars.

In addition to the preceding ten states there are the following: Four states require not less than two brakemen. Two states have special requirements as to brakemen. Commission regulations in the other five states vary considerably.

In addition to the States heretofore listed, other States have empowered regulatory commissions to impose requirements which may be assumed to cover the number of employees required to operate trains. Such, for example, are the powers conferred on the Illinois Commerce Commission by Chapter 111-⅔, Secs. 49 and 61, Rev. Stat. of Ill. 1929, where broad powers are given the commission to regulate the methods, and to insure the safety, of train operations.

Among the decisions of State Supreme Courts upon these laws may be cited the following:

Pittsburgh, Cincinnatti, C. & St. L. Ry. Co. vs. Indiana, 172 Ind. 147, sustaining the validity of the Indiana law (which required three brakemen on a freight train exceeding fifty-eight cars).

Pennsylvania Railroad vs. Ewing, 241 Pa. 581, sustaining the validity of the Pennsylvania law requiring three brakemen on freight trains exceeding thirty cars.

State ex rel Spillman vs. Chicago St. P. M. & O. R. Co., 115 Neb. 306, in which the court held, concerning the Nebraska law requiring three brakemen on local freights, as follows:

"It is probable, though we do not decide, that the State may under the police power regulate the size of the train crews on all railroad trains, and that enactments of the legislature in that behalf are not violative of the Federal Constitution. It may be admitted, too, that the transportation act of 1920 does not concern train crews."

According to *Statistics of Railways in the United States*, 1929, p. XXVI, the states above listed specifically regulating train crews contained in the aggregate, 44.88 per cent of the railway mileage in the United States.